76-835

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 538 F.2d 956. The opinion of the district court (App. E, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on July 13, 1976. A petition for

rehearing with suggestion for rehearing *en banc* was denied on October 26, 1976 (Apps. C and D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a United States District Court, as part of an admittedly valid order authorizing the use of a pen register to investigate gambling offenses being committed by means of the telephone, may properly direct the telephone company to provide federal law enforcement agents the facilities and technical assistance necessary for implementation of the court's order, in the absence of legislation expressly authorizing such an order.

STATUTE AND RULE INVOLVED

The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

STATEMENT

1. On March 19, 1976, upon application of the government, Judge Charles H. Tenney of the United States District Court for the Southern District of New York issued an order (C.A. App. 1-3) authorizing FBI agents to install a pen register[1] upon specified telephones, based on his finding that there was probable cause to believe that the telephones were being used in the commission of federal gambling offenses, in violation of 18 U.S.C. 371 and 1952. The order authorized use of a pen register until the telephone numbers of outgoing calls dialed from the subject telephones led to the identification of confederates of the suspects or until twenty days had elapsed from the date of the order, whichever occurred first (C.A. App. 2-3).[2] As part of the order, Judge Tenney directed that respondent telephone company "shall furnish the applicant forthwith all

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[1] "A pen register is a mechanical instrument attached to a telephone line * * * which records the outgoing numbers dialed on a particular telephone * * * The device is not used to learn or monitor the contents of a call nor does it record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated" (App. A, *infra*, pp. 1a-2a). See *United States* v. *Focarile*, 340 F. Supp. 1033, 1039-1040 (D. Md.), affirmed *sub nom. United States* v. *Giordano*, 469 F.2d 522 (C.A. 4), affirmed, 416 U.S. 505; *United States* v. *Caplan*, 255 F. Supp. 805, 807 (E.D. Mich.).

[2] After twenty days had passed and the pen register had still not been installed, the order was extended for another twenty days (C.A. App. 115).

information, facilities and technical assistance necessary to accomplish the interception unobtrusively," with compensation to be paid the company at the prevailing rates (C.A. App. 2).

After being informed of the pen register order, the telephone company provided the FBI with sufficient information to allow FBI agents to install and monitor a pen register located in the vicinity of the apartment containing the subject telephones [3] but refused to lease to the FBI a telephone line to which the pen register could be connected and monitored from a remote location (C.A. App. 8, 23-24).[4] In order to determine whether the investigation could be conducted unobtrusively without a leased line, FBI agents canvassed the neighborhood for three days in an attempt to find a location for the pen register from which FBI telephone lines could be strung to the terminal box without compromising the investigation. However, because of the location of

[3] This information included the location of the terminal boxes where the apartment telephone wires emerge from sealed telephone cables ("make an appearance") and identification of the specific terminals to which the wires leading to the subject telephones are connected (C.A. App. 16-17). See generally, Dash, Schwartz, Knowlton, *The Eavesdroppers*, 310-312 (1959).

[4] A "leased line" is an unused telephone line that makes an appearance in the same terminal box as the telephone lines of the suspects. Inside the box, the leased line can be connected to the subject line, and the pen register can then be installed upon the leased line at a remote location and monitored at that point (see C.A. App. 16-17).

the apartment and because the suspects were known to use counter-surveillance techniques, it was determined that the use of a leased line was essential (C.A. App. 24). Despite this, the telephone company refused to comply with the pen register order and provide the FBI with a leased line (C.A. App. 24-25).

2. The telephone company thereafter moved the district court to vacate that portion of the pen register order that directed it to furnish facilities and technical assistance to the FBI (C.A. App. 5-6). The district court denied the motion in an opinion issued on April 2, 1976. In its opinion, the district court first noted that the telephone company did not challenge the court's authority to authorize FBI agents to use a pen register (App. E, *infra*, p. 31a), but claimed only that because the order directed it to provide the FBI with cooperation that would give the FBI the capability to perform a full wire interception,[5] it could only be required to do so in an

[5] That assertion is not entirely correct. If the company provided a leased line to the FBI (or indeed, if it provided the minimal assistance originally offered here in a case where that would permit the FBI to install a pen register), the agents using the pen register would have the ability, if they chose to violate the court's order, to conduct a full wire interception, but only if they obtained additional equipment not required in a pen register investigation. Of course, an agent so violating the order would be in contempt of court, and any evidence obtained in that manner would presumably be inadmissible.

However, the telephone company could comply with the order and still reduce that risk to a minimum or even elimi-

order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510-2520) (App. E, *infra*, p. 35a). The district court rejected this argument, pointing out that Title III regulates wire interceptions and not pen registers (*id.* at 32a-36a). The court concluded by adopting the holding of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809, that a district court has inherent authority to compel the telephone company to provide facilities and technical assistance in connection with a pen register order (App. E, *infra*, pp. 37a-39a).[6]

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nate it totally by the type of facilities and technical assistance it provided. For example, the company could permit the pen register to be used by federal agents at the telephone company central exchange, where the opportunity to use unauthorized equipment would be extremely limited. Or the telephone company could attach a pen register to the subject telephone lines itself and then transmit the dial impulses over a leased line to the monitoring agents. In this situation an agent would not have the ability to monitor conversations even if he had the desire, because he would not have direct access to the telephone lines of the suspect.

[6] After the district court and the court of appeals refused the telephone company's motions to stay the pen register order pending appeal of the denial of the motion to vacate, the company on April 9, 1976 provided a leased line, allowing the use of the pen register from that date until April 28, 1976. Thus, the pen register investigation had been completed by the time of the court of appeals' decision in this case, and neither that decision nor a decision by this Court could affect this particular investigation. Nevertheless, as we demonstrate (*infra* pp. 17-20), this does not render the case moot because this is a classic example of a controversy which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515.

3. The court of appeals reversed, one judge dissenting (App. A, *infra*). The court began by noting that pen registers do not fall within the scope of Title III and are not otherwise prohibited or regulated by statute. The court agreed with the government that district courts have the power—either inherently or by analogy to Rule 41, Fed. R. Crim. P. —to authorize pen register surveillance, and it concluded that such power was properly exercised in this case (App. A, *infra*, pp. 3a-8a). However, the majority concluded that the district court abused its discretion in ordering respondent to assist in installing the pen register. It assumed *arguendo* "that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company," but it nevertheless held that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion" for the district court to order the company to provide facilities or assistance (*id.* at 13a). In reaching this conclusion, the majority recognized that (*id.* at 13a-14a):

> Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested requires no extraordinary expenditure of time or effort by [respondent]; indeed, as we understand it, providing lease or private line is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or crimi-

> nal liability; and the order itself provides for financial compensation for [respondent] for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered.

Despite these strong justifications for the district court's order, the majority concluded that the issuance of "such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (*id.* at 15a). It believed that Congress was better equipped than the courts to decide the circumstances under which the telephone company should be required to render assistance and facilities necessary for implementation of a pen register order (*id.* at 15a-16a).

In dissent, Judge Mansfield agreed with the majority's assumption that the district court possessed the power to require respondent to assist in implementing the order, but he disagreed that such orders constitute an abuse of discretion in the absence of explicit statutory authorization. As he stated: "[S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint" (*id.* at 24a). He further observed that district

courts could be trusted to use their powers under the Act only in "cases of clear necessity" and that the instant case was one in which the telephone company's assistance was appropriately ordered under that standard (*id.* at 22a-23a).

REASONS FOR GRANTING THE WRIT

1. Although the decision below is phrased in terms of abuse of discretion by the trial court, the basis for that finding does not lie in any particular facts of this case—indeed, the opinion specifically recognizes that the facts here strongly support the exercise of discretion. Instead, the majority has in substance concluded that it will *always* be an abuse of judicial discretion to require the telephone company to assist in the installation of a pen register, so long as there is no statute expressly authorizing such an order. Therefore, the decision below conflicts with that of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809, sustaining the validity of such an order under similar circumstances.

It is important that this Court promptly resolve this conflict among the circuits regarding the powers of the district court to assure implementation of pen register orders, both because the issue is at the heart of an increasing volume of litigation in the lower federal courts [7] and because the issue has a substantial practical impact upon effective law enforcement.

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[7] Challenges to pen register cooperation orders are now pending in three circuits: *In re Application*, No. 76-4117 (C.A. 5); *In the Matter of the Application* (C.A. 6), appeal

Moreover, to the extent that respondent's refusal to cooperate is based on a fear that voluntary assistance may subject it to civil or criminal penalties (App. A, *infra*, p. 9a), the decision below indicates to telephone companies throughout the country that the state of the law is unsettled; this, in turn, appears to be having the effect of encouraging them to challenge orders to assist in the installation of pen registers. The delays caused by litigation of such orders has serious adverse impact on fast-moving criminal investigations; thus, the practical effect of the uncertainty concerning the district courts' power to compel the telephone company to assist in installing pen registers is substantially interfering with the use of this investigative tool.

Furthermore, to the extent that telephone companies are, as in this case, successful in resisting any obligation to cooperate (and unwilling to cooperate voluntarily), the result ordinarily will be to foreclose the possibility of utilizing pen registers to aid in the detection of criminal activity. The practical

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of Ohio Bell Telephone Company from No. USDJ 26, N.D. Ohio, not yet docketed; *United States* v. *Southwestern Bell Telephone Company*, No. 76-1725 (C.A. 8). See also *Application of United States*, 407 F. Supp. 398 (W.D. Mo.), which concluded that district courts have no authority to issue pen register orders except incident to Title III interceptions. A case presenting a related question, namely, whether the telephone company may be required to assist in installing a device to identify the source of incoming calls in connection with a Title III wire interception, is pending in the Sixth Circuit. *Michigan Bell Telephone Company* v. *United States*, Nos. 76-2202, 76-2203.

consequence of this in many cases where there is reason to believe the telephone is being used to further unlawful activities is to impel law enforcement authorities toward utilization of wiretaps even though use of a pen register might suffice, simply because the telephone company can be judicially compelled to render assistance in installing a wiretap (18 U.S.C. 2518(4)). In terms of striking a sound balance between law enforcement needs and personal privacy interests, it seems to us plainly undesirable to deprive the government of the less intrusive investigative method of the pen register (which does not reveal the contents of conversations), as the court of appeals has done in this case.[8] The increased use of wiretaps is also undesirable insofar as it imposes added procedural burdens on the government and the courts in complying with the complex requirements of Title III.

The court of appeals implicitly recognized these drawbacks to its decision in expressing the hope that

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[8] Pen registers are frequently used in investigations that may later lead to applications for wire interceptions. In those situations, the initial use of the pen register protects privacy by helping to verify the need for an interception before it is utilized, and thus avoiding unnecessary interceptions. In addition, a pen register may be used when all the government needs to know is the location of a suspect or a fugitive. For example, a pen register on the telephone of a relative of such a person, when the government has probable cause to believe the phone will be used to contact him, may lead to the location of the subject. A pen register on the telephone of a narcotics dealer will be useful in disclosing the locations of his customers and facilitating surveillance of illicit activities.

Congress would promptly consider the legislation the majority believed necessary (App. A, *infra*, p. 16a). But further legislation is not necessary—the decision below is simply incorrect. It is justified neither by congressional intent as expressed in the enactment and amendment of Title III, nor by the need to guard against the possibility that law enforcement authorities, with the aid of federal courts, will indiscriminately "impress unwilling aid on private third parties" (App. A, *infra*, p. 15a).

2. a. In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2510-2520). That legislation embodied the first statutory authorization for the use of electronic surveillance by law enforcement officers under court supervision and in accordance with exacting standards set forth in the Act. At the same time, by Section 803 of Title III (82 Stat. 223), Congress amended Section 605 of the Communications Act of 1934, 48 Stat. 1064, 1103, 47 U.S.C. 605. Both the majority and the dissenting judge below agreed that by this legislation Congress excluded pen registers from the scope of Title III and amended Section 605 so that it would no longer prohibit the use of pen registers, as the prior language of that statute had been held to do (App. A, *infra*, pp. 3a-8a, 17a). See 18 U.S.C. 2510(4); 47 U.S.C. 605; S. Rep. No. 1097, 90th Cong., 2d Sess. 90, 107-108 (1968). See also *United States* v. *Giordano*, 416 U.S. 505, 553-554 (Powell, J., concurring and dissenting); *United*

States v. *Illinois Bell Tel. Co.*, *supra*, 531 F.2d at 812, and cases cited therein.

It is also plain, as the majority below assumed and the dissent agreed, that the district court had jurisdiction to issue an order authorizing the use of pen registers in the instant investigation.[9] And to give effect to this power, the district court had the concomitant power under the All Writs Act, 28 U.S.C. 1651(a), to order the telephone company to provide facilities and assistance, which only it could supply and which were necessary to implement the court's order.

The purpose of the All Writs Act is "to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution * * *." *Harris* v. *Nelson*, 394 U.S. 286, 299-300. The duty to issue warrants when required by the Fourth Amendment, and where appropriate, resides in the judiciary, and the All Writs Act gives federal courts the power to make their lawfully issued warrants effective. *United States* v. *Illinois Bell*

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[9] The source of the district court's power to issue a pen register order has been found by the court below and the Seventh Circuit either in Rule 41, Fed. R. Crim. P., or in the court's inherent power. Rule 57(b), Fed. R. Crim. P., is presently the procedural means through which a district court's inherent power is exercised. The Rule provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Tel. Co., *supra*, 531 F.2d at 814.[10] The order in this case that the telephone company provide facilities and services (without which the pen register authorization would be meaningless) is, as Judge Mansfield noted (App. A, *infra*, p. 19a), not materially different from similar types of orders validly issued pursuant to the Act. See, *e.g.*, *Board of Education* v. *York*, 429 F.2d 66, 68-69 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *Field*, 193 F. 2d 92, 95-96 (C.A. 2), certiorari denied, 342 U.S. 894.

b. The majority's holding that federal courts should await congressional guidance before using their power to require telephone company assistance seriously underestimates the capability of the federal judiciary to exercise this power with restraint.[11] The

[10] *Application of the United States*, 427 F. 2d 639 (C.A. 9), does not hold to the contrary. The basis for the decision in that case that the district courts did not have the power to order telephone company assistance in wire interceptions was that Congress by Title III had completely pre-empted the field of wire interceptions, and that if it had desired the courts to have such power it would have granted it. The case is inapplicable here, because Congress explicitly declined to regulate pen registers in Title III; they are thus outside any pre-empted area. In any event, when Congress amended Title III in 1970 to provide the explicit authorization for orders requiring telephone company assistance in installing interceptions (84 Stat. 654), it made clear that there had been no intent to withhold such authority originally. See 115 Cong. Rec. 37192-37193 (1969). There is even less reason to infer such intent with regard to pen register orders.

[11] Congress has already indicated that it expects pen registers to be used (see *supra*, p. 12); their use is evidently one of the "normal investigative procedures" to be considered before application for interception orders (see 18 U.S.C. 2518 (1)(c) and (3)(c)). Since telephone company assistance is necessary for their installation, Congress could hardly have intended to give the telephone company an absolute veto over pen register use.

majority feared that approval of the court's exercise of discretion in ordering the clearly necessary and non-burdensome assistance at issue here might lead to situations in which the court would be unable "to protect [a] third party from excessive or overzealous Government activity or compulsion" (App. A, *infra*, p. 16a). But as the dissent points out (*id.* at 24a):

> [S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint.

This conclusion is strongly supported by the fact that when Congress found it necessary to provide explicit authority for orders requiring telephone company assistance in installing wiretaps, it did not limit that authorization by any such statutory blueprint to govern judicial discretion.

Similarly, the decisions of this Court suggest that no specific statutory authorization is necessary. In *Katz* v. *United States*, 389 U.S. 347, 354-355, the Court stated that the electronic surveillance in that case would have been constitutional had it been conducted pursuant to court order; there was no sugges-

tion that a statute was required before such an order could be issued. Cf. *United States* v. *United States District Court*, 407 U.S. 297, 306-308, 321-324.

c. Finally, we submit that the majority's concerns were based on a misunderstanding of the extent of the telephone company's duty to assist in criminal investigations. The executive branch of government has inherent power to require the assistance of citizens in carrying out its law enforcement duties.[12] As applied here, this assistance is particularly defined and imposes no significant burden on the company. Moreover, the telephone company is not a mere citizen corporation, but a common carrier charged with special obligations to the public. Cf. *Balinovic* v. *Evening Star Newspaper Co.*, 113 F. 2d 505, 506-507 (C.A.D.C.), certiorari denied, 311 U.S. 675. Con-

[12] A basic illustration of this inherent power is the *posse comitatus*, in which law enforcement officers may require the assistance of members of the public in carrying out their duties. See *In re Quarles and Butler*, 158 U.S. 532, 535. As Mr. Justice Cardozo, then sitting on the New York Court of Appeals, said (*Babington* v. *Yellow Taxi Corp.*, 250 N.Y. 14, 17, 164 N.E. 726, 727): "Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." He later referred to this obligation as the "duty of the able-bodied citizen to aid in suppressing crime." *Hamilton* v. *Regents*, 293 U.S. 245, 265 fn. * (concurring). This duty is not limited to emergency situations or to hot pursuit arrests, but applies equally in the case of necessary assistance in executing search warrants, as Congress recognized in 18 U.S.C. 3105. See *Elrod* v. *Moss*, 278 Fed. 123, 129 (C.A. 4).

gress has required the telephone company to provide telephone services upon reasonable request, 47 U.S.C. 201, and it cannot be seriously contended that a request for assistance by the FBI in cases such as this is unreasonable. See also 47 U.S.C. 202, 605(6).

Indeed, the telephone company is under a particular obligation to aid the government here, because it is no mere bystander in relation to the crimes being investigated. On the contrary, it is providing telephone facilities to those whom a district court has determined are probably using them to commit federal crimes. In such circumstances, it is disingenuous for the telephone company to argue that any assistance to law enforcement officers creates "the danger of indiscriminate invasions of privacy" (App. A, *infra*, p. 15a).

3. In this case the telephone company complied with the pen register order of the district court after both lower courts had denied stays pending its appeal; accordingly, the pen registers were installed and the investigation completed some months prior to the decision of the court of appeals. Nevertheless, we submit that this case is not moot. Rather, this is a classic example of a controversy that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515; *Roe* v. *Wade*, 410 U.S. 113, 125; cf. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308-309. In *Weinstein* v. *Bradford*, 423 U.S. 147, 149, the Court reiterated that this doctrine "was limited to the situation where two

elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Both these elements are satisfied here.

Pen register orders authorize surveillance only for brief periods. As is typical, the order here was limited to a maximum of twenty days; it was then extended for twenty days after review in the district court. Despite expedited action by the court of appeals, the order and the investigation expired six days after oral argument. Moreover, even had the pen register order been stayed pending appeal, the mootness problem would not have been avoided. Full litigation includes the opportunity for effective appellate review, including review by this Court. *Roe* v. *Wade*, *supra*, 410 U.S. at 125. But before that review could be completed, the showing of probable cause upon which the order authorizing the installation of the pen register was based would have become stale. Thus, even with a stay, this Court would nevertheless be in the position of passing upon the validity of an order that could no longer be enforced if it were upheld.[13] In sum, the realities of the in-

[13] The Fifth Circuit ignored the time required for review by this Court when, in *Southern Bell Tel. & Tel. Co.* v. *United States*, 541 F.2d 1151, it dismissed as moot an appeal raising the issues involved here on the theory that a stay and an expedited appeal would permit appellate review of the district court's order before it became moot.

vestigation of crime preclude effective appellate review of orders like the one involved here, if the case becomes moot when the order expires, either because the telephone company has provided the assistance required or because the underlying order upon which the requirement rests has lapsed for staleness. The order here, like that in *Nebraska Press Ass'n* v. *Stuart*, No. 75-817, decided June 30, 1976, slip op. 6, is "by nature short-lived." Here, as there, the expiration of the particular order does not moot the case. Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319.[14]

Regarding the second element set forth in *Weinstein*, it is plain that this issue will be joined again between the telephone company and the government in the future if it is not resolved now.[15] Pen registers

[14] It is possible to conceive of situations in which the issue here could arise in a way in which the short life of the order would not preclude review—for example, if the telephone company were held in criminal contempt. But we believe that the "evading review" test is met when the order will not be reviewable in the normal course of events, and that the parties should not be denied review until the issue arises in some unusual posture that avoids the mootness problem (which, of course, may never actually happen).

[15] If the case is moot, it became so when the pen register was removed on April 28, 1976, before the court of appeals' judgment was entered on July 13, 1976, and that judgment should be vacated. If that were done, there would be no bar to the issuance of similar assistance orders by other district courts in the second circuit in the future. Alternatively, if the judgment below remains in effect and compels compliance by the district courts in the Second Circuit, the case is not moot because "incapable of repetition." See *Richardson* v. *Ramirez*, 418 U.S. 24, 35-36.

are useful investigative tools, which we intend to continue to seek to utilize in the future despite a consistent telephone company policy of refusing to render voluntary assistance in installing them. *Southern Bell Tel. & Tel. Co.* v. *United States*, *supra*, 541 F.2d at 1155-1156; see cases cited *supra*, n. 7.[16]

In sum, despite respondent's compliance with this particular order, this case presents a well-defined controversy between the parties on an important issue that is bound to arise between them in the future and to evade review before subsequent orders expire. See Note, *The Mootness Doctrine in The Supreme Court*, 88 Harv. L. Rev. 373 (1974). It is consequently not moot.

[16] There does not seem to be any possibility that the mootness problem could be avoided by a class action, as it was, for example, in *Sosna* v. *Iowa*, 419 U.S. 393, 399-403. The interests affected by the issue here, although important, involve only law enforcement officials and the telephone company; neither party could claim to represent a class.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1068, Docket 76-1155

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE

Argued April 22, 1976

Decided July 13, 1976

Before MEDINA, FEINBERG and MANSFIELD, Circuit Judges.

MEDINA, Circuit Judge:

This important and interesting case involves the Government's application for an order authorizing the installation and use of a pen register, and directing the New York Telephone Company to provide information, facilities and technical assistance to Special Agents of the Federal Bureau of Investigation in the installation and operation of the device. A pen register is a mechanical instrument attached to a telephone line, usually at a central telephone office, which records the outgoing numbers dialed on a particular telephone. In the case of a rotary dial phone, the pen register records on a paper tape dots or dashes equal in number to electrical pulses which correspond to the telephone number dialed. The de-

vice is not used to learn or monitor the contents of a call nor does it record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated. *See United States* v. *Caplan*, 255 F.Supp. 805, 807 (E.D.Mich. 1966). The device used for touch tone telephones, the TR-12 touch tone decoder, is very similar to a pen register, differing primarily in that it causes the digits dialed on the subject telephone to be printed in arabic numerals, rather than dots or dashes, corresponding to the electrical pulses. *See United States* v. *Focarile*, 340 F.Supp. 1033, 1039-1040 (D.Md. 1972), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

By an order dated March 19, 1976, Judge Charles H. Tenney of the United States District Court for the Southern District of New York directed the Telephone Company to furnish to government agents investigating an alleged illegal gambling operation "All information, facilities and technical assistance necessary to accomplish the interception [by pen register] unobstrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted * * *." Pursuant to this order, the Telephone Company agreed to provide information such as terminal locations and cable and pair identifications, but declined to furnish telephone lease or private lines, citing Telephone Company regulations which prohibited such assistance Government Special Agents determined that without these lease lines they could not successfully implement pen register surveillance; Telephone Company assistance in this regard was thus crucial. On March 30, 1976, appellant moved by order to show cause to vacate or modify that portion of Judge Tenney's March 19, 1976 order which mandated technical assistance by the Telephone Company in the installation of pen registers, contending that the order was without legal authority. In an opinion of April 2, 1976, not yet reported, Judge Tenney denied the motion in all respects. Appellant then promptly filed a notice of appeal and moved for a stay of both District Court orders pending appeal. This Court denied the motion for a stay on April 8, 1976, and ordered an expedited appeal.

We will consider separately the two questions raised on this appeal: first, whether the District Court erred in authorizing the use of a pen register; and second, whether it erred in ordering the appellant to provide technical assistance to the Government. As it appears that this is the first time these important issues have been reviewed by this Court, we believe they merit some extended discussion.

I

In 1968, the Congress enacted the Omnibus Crime Control and Safe Street Act, Title III of which added Sections 2510-2520 to Title 18 of the United

States Code and amended Section 605 of the Federal Communications Act of 1934, 47 U.S.C. Section 605. Title III is a comprehensive electronic surveillance statute, prohibiting all wiretapping and other types of electronic surveillance except by law enforcement officials investigating certain specified crimes. The statute requires compliance with strict procedures, all under judicial supervision. Both parties agree that pen register orders are not covered by Title III because its provisions apply only to surveillance which involves an "interception" of wire communication, or an "aural acquisition," as interception is defined in 18 U.S.C. Section 2510(4), and because the legislative history makes clear that there was no Congressional intent to subject pen registers to the prospective standards of Title III.[1]

> The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example would be permissible. [citation omitted]. The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. S.Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968), U.S. Code Cong. & Admin. News 1968, pp. 2112, 2178.

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[1] *See also Blakey*, "A Proposed Electronic Surveillance Act," 43 Notre Dame L.Rev. 657 (1968). Professor Blakey, who has been credited with primary authorship of Title III, *see United States* v. *Giordano*, 416 U.S. 505, 517 n. 7, 526 n. 16, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), states that Title III was not intended to prevent the tracing of phone calls by the use of a pen register.

Other courts faced with the question of the applicability of Title III to pen register orders have likewise concluded that they are excluded. *See United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 408, 410, (N.D.Ill., 1976); *United States* v. *Giordano*, 416 U.S. 505, 553-54, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, *J.*, concurring in part and dissenting in part, joined by Burger, *C. J.*, Blackmun & Rehnquist, *JJ.*); *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339, 43 L.Ed.2d 432 (1975); *United States* v. *Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971).[2]

It is also clear that pen register orders are not now covered by Section 605 of the Federal Communications Act of 1934. Prior to the enactment of Title III, there was authority for the broad applicability of Section 605 to the interception and disclosure of "any communication," including pen registers. *See United States* v. *Dote*, 371 F.2d 176 (7th Cir. 1966); *United States* v. *Caplan*, 255 F.Supp. 805 (E.D. Mich. 1966). The amendment of Section 605 effected by Title III restricted the coverage of that Section to radio communications, and withdrew the interception of wire or oral communications from the ambit of that Section, making Title III the sole governing provision. The legislative history of the amendment seems to us to

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[2] *But see United States* v. *Lanza*, 341 F.Supp. 405, 422 (M.D.Fla. 1972), where the court held that pen register orders fall within Title III when they are issued in connection with a wiretap order.

indicate an intention by the Congress to disavow *Dote* and its progeny.[3]

> This [new] section amends section 605 of the Communications Act of 1934 * *. This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed [Title III] * *. S.Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968), U.S. Code Cong. & Admin. News 1968, p. 2196.

While in agreement that pen register orders are thus not within Title III or Section 605, the parties draw conflicting inferences from this absence of coverage. The Telephone Company argues that absent authorization in Title III or other statutes, the District Court has no authority to order the installation and use of a pen register. The Government argues that a District Court has inherent authority or power under Rule 41, F.R.Cr.P., to issue such an order, subject only to the restraints of the Fourth Amendment. They point to the statement of Justice Powell in *United States* v. *Giordano*, *supra*, 416 U.S. at 553-54, 94 S.Ct. at 1844, 1845 where he stated by way of dictum:

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[3] *United States* v. *Dote*, 371 F.2d 176 (7th Cir. 1966), may, however, retain some residual vitality in cases where a pen register order is issued in conjunction with a wiretap order. *See United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 408, 411, (N.D.Ill., 1976); *United States* v. *Lanza*, 341 F.Supp. 405, 422 (M.D.Fla. 1972).

> Because of pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register.

We take this statement to mean that a pen register order involves a search and seizure under the Fourth Amendment, and that a court may issue such an order only upon a showing of probable cause.

In *United States* v. *Illinois Bell Tel. Co.*, *supra*, the Seventh Circuit, in considering the power of the federal courts to issue pen register orders, concluded that ample authority could be found either in the inherent power of the courts or by analogy to Rule 41, F.R.Cr.P. The court held that a "commonsense approach" dictated that authority tantamount to that found in Rule 41 for the search and seizure of tangible objects be found to exist for an order authorizing the search and seizure of non-tangibles, such as information gleaned from pen register surveillance. *Id.*, at 411. We agree with this reasoning. While the electronic impulses recorded by pen registers are not "property" in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of non-tangible property. *But see In the Mat-*

ter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, 407 F.Supp. 398 (W.D.Mo.1976). Moreover, relying principally on Justice Powell's statement in *United States* v. *Giordano*, *supra*, we agree with the Seventh Circuit that a pen register order may only be issued after a showing of probable cause. We cannot concur in the view, voiced by some commentators, that pen register orders are constitutionally indistinguishable from mail covers, which are initiated by subpoena, and therefore should fall outside Rule 41. *See* Statement of Professor G. Robert Blakey, NWC Law Enforcement Effectiveness Conference 38-39 (1976); Note, "The Legal Restraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell L.Q. 1028 (1975). If anything, we think this argument speaks in favor of more stringent regulation of mail covers, and in no way detracts from our conclusion here.

In our view, the power to order pen register surveillance, whether considered a logical derivative of Rule 41 or a matter of inherent judicial authority, is the equivalent of the power to order a search warrant, and is thus subject to the requirements of the Fourth Amendment. As the order authorizing the installation and use of a pen register was here issued by Judge Tenney upon a showing of probable cause, we conclude that it was properly granted.

II

The next question is whether or not the court below properly ordered appellant to provide technical assistance to federal law enforcement agents in their operation of the pen register. This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding the power of a federal court of mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction.

At the outset it should be noted that we are not concerned with the question of whether the Telephone Company could voluntarily assist in effectuating pen register surveillance, but rather only with whether they may be compelled to do so. Furthermore, we deem unfounded the Telephone Company's stated fear of criminal liability under 47 U.S.C. Section 501 and civil liability under 47 U.S.C. Section 206 for voluntary or compelled assistance in operating the pen register. 18 U.S.C. Section 2520, which provides a civil cause of action for any individual whose wire or oral communication is intercepted in violation of Title III, states that "good faith reliance on a court order * * * shall constitute a complete defense to any civil or criminal action brought under this chapter *or under any other law*." [emphasis added]. Our inquiry is limited to the question of whether or not the District Court had authority to compel assistance,

and if so, whether or not that power was properly exercised.

Prior to its amendment in 1970, Title III was silent as to whether or not a court could order a private party, such as a telephone company, to provide technical assistance to law enforcement officials in the installation and use of wiretap devices. In May, 1970, the Ninth Circuit held in *Application of the United States*, 427 F.2d 639 (9th Cir. 1970) that absent express statutory authorization, a federal district court was without power to compel technical cooperation by the Central Telephone Company of Nevada in the interception of wire communications. Some two months after that decision, 18 U.S.C. Sections 2511,[4]

[4] § 2511. Interception and disclosure of wire or oral communications prohibited

* * * *

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

2518[5] and 2520[6] were amended to provide that a communication common carrier, or other firm or individual, could be compelled to furnish such technical assistance as requested by government agents, without fear of criminal or civil liability.

As we have already said, however, Title III does not cover the issuance of pen register orders or corollary orders compelling technical assistance. While conceding this absence of coverage, the Government contends that the federal courts have either inherent authority or power under the All Writs Act, 28

[5] § 2518. Procedure for interception of wire or oral communications

* * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * * *

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

[6] § 2520. Recovery of civil damages authorized

* * * *

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

U.S.C. Section 1651(a) to compel the Telephone Company to assist in installing and operating the pen register. In support of their argument they cite *United States* v. *Illinois Bell Tel. Co., supra,* where the court found authority for the issuance of such an order to exist on both such bases. It appears that that was the first time a court construed the All Writs Act, or the notion of inherent judicial power, to provide justification for the entry of such an order in aid of its jurisdiction to order a search and seizure. The Seventh Circuit reasoned that since the federal courts have authority to enter orders authorizing government agents to employ a pen register, they must have analogous authority to compel assistance by a telephone company as non-compliance by the company would frustrate the issuance of the pen register order by rendering pen register surveillance technically infeasible.

The All Writs Act provides that a federal court may issue any writ "necessary or appropriate in aid of [its] respective [jurisdiction] and agreeable to the usages and principles of law." Once jurisdiction is properly vested in a federal court on some independent basis, the Act empowers that court to enter such orders as it deems necessary, in its discretion, to preserve and protect its jurisdiction. It must be emphasized that the Act, even if found to be applicable here, is entirely permissive in nature; it in no way mandates a particular result or the entry of a particular order. It is addressed to the discretionary power of the court. Similarly, when one

speaks of inherent judicial authority and argues for its exercise, as does the Government here, one invokes the discretionary power of the court and petitions for the entry of an order not otherwise provided for by specific statutory authority. Thus, even if we were to assume *arguendo*, as we do, that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company, it is for this court to determine whether, on balance, the exercise of that power by the court below was proper or whether it constitutes an abuse of discretion. For the reasons detailed below, we conclude that, assuming the existence of the powers found by the Seventh Circuit, in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance.

Probably the most persuasive point argued by the Government in support of such an order is that without the appellant's technical aid, the order authorizing the use of a pen register will be worthless. Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested requires no extraordinary expenditure of time or effort by appellant; indeed, as we understand it, providing lease or private lines is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or criminal liability; and the order itself provides for financial

compensation for appellant for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered. Notwithstanding the alacrity with which the Congress acted to amend Title III after the Ninth Circuit decision in *Application of the United States, supra*, there is no certainty that the Congress will similarly enact legislation authorizing orders compelling technical assistance in the case of pen register surveillance, or even if they do, that they will act promptly. Undue delay here would predictably impede if not entirely negate the Government's attempts to apprehend the suspected illegal gambling operators.

Against these considerations, however, must be weighed the factors which militate against issuance of an order mandating technical assistance. We think a consideration of these factors compels the conclusion that the issuance of such an order by the court below represented an abuse of discretion.

Congress did act quite rapidly to remedy the absence in the Title III of any provision for compelling technical aid by communication common carriers after the Ninth Circuit rendered its decision. We do not agree with the Seventh Circuit that one may only infer from this speedy action that the Congress must have assumed that the federal courts possessed inherent power to compel assistance or that the telephone companies would voluntarily asist. *United*

States v. *Illinois Bell Tel. Co., supra*, at 412. On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by the Congress was due to a doubt that the courts possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorization should be required in connection with pen register orders, especially as the two are so often issued in tandem.

Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step.

While the Congress can clearly limit authorization for such orders to specific types of assistance and to

federal law enforcement investigations of certain specified crimes, limitations by the courts cannot so easily be drawn, as our authority must be derived from the very general All Writs Act or the even more amorphous notion of inherent judicial power. We must be concerned not only with the Fourth Amendment rights of those whose telephone calls are monitored by pen register surveillance, but with the privacy rights of those third parties, communication common carriers and private parties alike, who might be called upon to aid the Government in its law enforcement endeavors. While a court may immunize such a third party from criminal or civil liability for its technical assistance, there is no assurance that the court will always be able to protect that third party from excessive or overzealous Government activity or compulsion. The potential dangers inherent in such a judicial order, and the future orders it spawns, compel us to conclude that if indeed the Government requires technical assistance, it is far better to have the authority for ordering that assistance clearly defined by statute. We thus agree with the advice of the Ninth Circuit: "If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." *Application of the United States, supra,* at 644. We have every hope that the Congress will promptly undertake consideration of these pen register orders and the technical assistance required to install and operate them.

Accordingly, we affirm Judge Tenney's order insofar as it authorizes the use of a pen register, and reverse that part of the order which mandates assistance by appellant in the installation and operation of the pen register.

MANSFIELD, Circuit Judge (concurring and dissenting):

I agree with the majority's holding that the district court possessed the power to order installation of a "pen register." However, I cannot agree that it was an abuse of discretion to require the Telephone Company to assist in installing it. On the contrary, a direction that the Telephone Company render assistance was obviously essential to implement the court's pen register order since otherwise that order would amount to nothing more than an empty gesture. The assistance order was therefore well within the district court's discretionary authority under the All Writs Act, 28 U.S.C. § 1651 (a) and no further specification of authority by Congress was required. Accordingly, I would affirm.

Judge Medina's opinion starts out on a satisfactory enough note by correctly concluding that the district court had jurisdiction to authorize installation of the pen register by federal agents upon a showing of probable cause. See *United States* v. *Giordano*, 416 U.S. 505, 553-54, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, *J.*, concurring and dissenting); *United States* v. *Illinois Bell Telephone Co.*, 531 F.2d 809, 812-13 (7th Cir. 1976). The majority then

assumes (without expressly deciding) that the All Writs Act provides the court with such authority as it needs to require Telephone Company assistance. In my view this assumption also is clearly correct.

The All Writs Act provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Although the Act does not itself furnish jurisdiction, see e.g., *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U.S. 109, 27 S.Ct. 24, 51 L.Ed. 111 (1906), it does authorize the court in proper cases to issue auxiliary orders necessary to render effective its exercise of jurisdiction otherwise obtained. "[A] federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942). See *Hamilton* v. *Nakai*, 453 F.2d 152, 157 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed. 2d 332 (1972) ("[O]nce jurisdiction has attached, powers under § 1651(a) should be broadly construed.") The power conferred by the Act extends to issuing injunctions and other writs against persons who, though not parties to the original action, may thwart the effectuation of the court's decision. See *Mississippi Valley Barge Line Co.* v. *United States*, 273 F.Supp. 1, 6 (E.D.Mo.1967), *aff'd mem.*, 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed.2d 779 (1968).

It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co.*, *supra*, the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant. But such an order is no more novel than others issued under the Act, which have been upheld when needed to implement a court's decisions. See, e.g., *Board of Education* v. *York*, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 968, 28 L.Ed.2d 237 (1971) (order requiring parents to send son to particular school to further desegregation plan); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C.Cir.), *rehearing en banc denied*, 118 U.S.App.D.C. 90, 331 F.2d 1010, *cert. denied*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964) (one-judge order requiring blood transfusion); *United States* v. *Field*, 193 F.2d 92, 95-96 (2d Cir.), *cert. denied*, 342 U.S. 894, 74 S.Ct. 202, 96 L.Ed. 670 (1951) (order requiring bail committee members to answer questions regarding fleeing defendants).

Once we agree that the district court had jurisdiction to issue a pen register order and authority under the All Writs Act to direct third parties to render such assistance as is reasonably necessary to implement its exercise of jurisdiction, I find it impossible on this record to accept the majority's conclusion that it was an abuse of discretion to direct that such assistance be rendered in this case. As the majority

opinion notes, the assistance of the Telephone Company was here necessary for the installation of the pen register; due to the physical peculiarities of the location to be put under surveillance it would have been difficult if not impossible, for the agents to install the device on their own without detection. Furthermore, the Telephone Company concedes that the assistance required of it was not burdensome; all that was required was the provision of certain plans and the flicking of a switch at a central terminal. Finally, the intrusion into the privacy of the targets of the surveillance and their communications was less than would occur had the government sought authorization of a Title III wiretap; only the destination, not the content, of telephone messages was to be monitored.[1] It is the function of the district court to weigh such considerations when exercising its discretion, and in this case the balance clearly points toward requiring Telephone Company assistance.

Despite the compelling case made out here for exercise of discretion in favor of the assistance order,

[1] It is possible that the result of holding that the Telephone Company cannot be required to give assistance in the installation of a pen register may be, paradoxically, to increase the amount of electronic surveillance. Since the Telephone Company can be required under the 1970 amendment to Title III, 18 U.S.C. § 2518(4), to provide assistance in installing a Title III wiretap, law enforcement agents may be compelled to seek such wiretap authority in order to receive Telephone Company assistance, even if their primary interest lies simply in determining the locations to which calls are placed rather than in the monitoring of content which the wiretap would permit.

the majority has concluded that the district court's action represented an abuse of discretion. None of the reasons offered in support of that conclusion, however, can withstand scrutiny. First it is suggested that the 1970 amendment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, following the decision in *Application of United States*, 427 F.2d 639 (9th Cir. 1970), represented implicit Congressional approval of the Ninth Circuit's view that a court does not have power under the All Writs Act or otherwise, to require Telephone Company assistance in electronic surveillance.[2] The Supreme Court has, however, long cautioned against drawing the inference that an express Congressional grant of authority to an agency necessarily implies that the agency previously lacked such authority. As Justice Jackson wrote in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47, 70 S.Ct. 445, 453, 94 L.Ed. 616 (1950), "we will not draw the inference . . . that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." See *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-12, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) (FTC requests

[2] The majority's view of the Congressional intent behind the 1970 amendment can find no support in the meager legislative history of the amendment, which was approved as a rider to the District of Columbia Court Reform and Criminal Procedure Act of 1970.

for specific authority to seek injunctions against mergers, even if granted, would not imply such power was lacking under the All Writs Act). Thus, it is impossible to conclude that because Congress acted to provide express authority to the courts to require Telephone Company assistance in installing Title III wiretaps, similar express authorization is required to issue the present order involving a pen register which both parties agree is wholly outside the ambit of Title III. Although Congressional clarification of the court's power to order Telephone Company assistance in the installation of pen registers would place the matter beyond argument, it is wholly unnecessary to impose this burden upon Congress. The district court clearly possesses the authority under the All Writs Act.

The majority next concludes that, although an assistance order may be desirable in the circumstances of the present case, it would be the first step down a slippery slope in which law enforcement agents would obtain judicial orders requiring progressively more assistance from third parties in furtherance of government investigations. Here I must respectfully disagree. To hold that the district court acted properly within the scope of its powers in the present case would not write a carte blanche for any and all orders which law enforcement agencies might seek in the future. While the powers conferred by the All Writs Act are broad, they are to be reserved for cases of clear necessity, as this court has frequently observed in passing upon demands that it exercise

its power under the Act to issue mandamus to district courts. See, e.g., *United States* v. *Weinstein*, 511 F.2d 622, 626 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975); *United States* v. *Dooling*, 406 F.2d 192, 198 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969); *Electric & Musical Industries Ltd.* v. *Walsh*, 249 F.2d 308 (2d Cir. 1957). We have had sufficient confidence in our district judges over the past century to vest them with discretionary power to issue such extraordinary relief as temporary restraining orders and preliminary injunctions. I see no reason for not trusting them to employ sensible standards in deciding whether auxiliary relief should be granted under the All Writs Act. Because of the combination of clear necessity for Telephone Company assistance and the minimal burdens on that company, this is a case where application of such standards mandates assistance from the Telephone Company. Were the necessity lesser, or the burden greater, in some future case, a district court might not be justified in invoking its extraordinary powers. That is what exercise of discretion is all about. I see no reason to assume that the district courts will in the future grant law enforcement agencies such relief on anything less than a showing of the compelling nature here made, or that, in reviewing such orders, future panels of this court will be any less sensitive than the present majority to the problems involved.

Nor can I agree with the majority that Congress, as distinguished from federal courts, is in a better

position to define the conditions under which assistance by third parties may be ordered or the scope of that assistance. Surely it did not do so in its 1970 amendment of Title III [3] and no necessity for doing so in the present case has been shown. Aside from the obvious need for minimal help from the Telephone Company in the present case, there is no basis for believing that the government will need, much less demand, other types of assistance in the investigation of other types of crimes. In any event, since the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint. In short the majority, ignoring the principle that "Sufficient unto the day is the evil thereof," [4] paints imaginary and unlikely devils on the wall. However, should these devils ever appear in real life, I am confident that the district courts' sound exercise of discretionary power would be more than sufficient to deal with them.

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[3] The 1970 amendment simply and broadly authorizes courts to require communications carriers to provide "all information, facilities, and technical assistance necessary" in installing Title III wiretaps. 18 U.S.C. § 2518(4).

[4] New Testament: Matthew, vi, 34.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of July, one thousand nine hundred and seventy-six.

Present: HON. HAROLD R. MEDINA
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges.

76-1155

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY, ("TELEPHONE") APPELLANT.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the order of said district court be and is hereby affirmed in part and reversed in part in accordance with the opinion of the court.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-six.

Present: HON. HAROLD R. MEDINA
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges.

76-1155

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY, ("TELEPHONE")
APPELLANT.

A petition for a rehearing having been filed herein by counsel for the United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-six.

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY,
APPELLANT.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the United States of America, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Timbers, Gurfein and Van Graafeiland did not participate in consideration of the petition.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Misc. No. 19-97(44)

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILIAR MECHANICAL DEVICE.

MEMORANDUM

APPEARANCES

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TENNEY, J.

On March 19, 1976, this Court granted the application of the Department of Justice[1] for an order

[1] The Government's application was submitted by Peter D. Sudler, a Special Attorney of the United States Department of Justice, New York Joint Strike Force Against Organized Crime. The application was supported by the affidavit of Walter F. Smith, a Special Agent of the Federal Bureau of Investigation.

directing New York Telephone Company[2] ("Telephone") to furnish the information, facilities, and technical assistance necessary to enable agents of the Federal Bureau of Investigation ("FBI") to install "pen registers" on two telephones. The application specified two telephones subscribed to by a specified individual and located at a specific address. In response to the Court's order, Telephone moved, by order to show cause, to vacate or to modify the order. While not contesting the right of the Government to employ the "pen register", Telephone objected to so much of the Court's order as directed it to provide all information, facilities (including lease lines), and technical assistance necessary for the utilization of the "pen register".

Based upon the papers submitted and the arguments heard and for the reasons stated below, the motion to vacate or modify this Court's previous order is hereby denied.

Telephone challenges the Court's direction that it furnish technical assistance, including lease lines, to law enforcement officials for installation and utilization of the "pen register". Telephone does not challenge the Court's jurisdiction to authorize use of the "pen register", nor does it contend that there

[2] New York Telephone Company is a communications common carrier as defined in 18 U.S.C. § 2510(10).

was no probable cause supporting the Court's order. Indeed, Telephone has been willing and continues to be willing to provide the Government with all the necessary information that would enable the FBI to install a "pen register". It is Telephone's position, however, that its facilities and technical assistance may be furnished to law enforcement officials only pursuant to an application under 18 U.S.C. §§ 2510 *et seq.* These sections constitute Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"). Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." *United States* v. *Giordano*, 416 U.S. 505, 507 (1974). Briefly, the Act confers power upon the Attorney General or a specially designated Assistant Attorney General to apply for a federal court order authorizing wire interceptions. 18 U.S.C. § 2816(1).

A "pen register" is a mechanical device which picks up electrical impulses which are used to decode the telephone numbers dialed in outgoing calls.[3] Tele-

[3] A "pen register" is more fully defined and explained as follows:

> "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court. 340 F. Supp. 1033, 1038-1041 (Md. 1972)." *United States* v. *Giordano, supra*, 416 U.S. at 549 n. 1.

phone concedes that the application for a "pen register" is *not* an application for a wire or oral interception within the purview of Title III. (Telephone's Memorandum of Law at 5).

There is significant authority for this Court to find that the "pen register" in this instance was not a device for wire or oral interception covered by the prescriptions of Title III. 18 U.S.C. § 2510 contains the following definition:

> "As used in this chapter—
>
> (4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

"Aural" has been defined as "'of or relating to the sense of hearing.'" *United States* v. *Focarile*, 340 F. Supp. 1033, 1039 (E.D. Mo.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (3rd Cir. 1972), *aff'd*, 416 U.S. 505 (1974), *quoting* Webster's Third New International Dictionary. A "pen register" decodes phone numbers by responding to electric impulses and not to aural stimuli.

The legislative history of Title III clearly discloses a Congressional intent to exclude "pen registers" from the Act's strictures.

> "Paragraph (4) defines 'intercept' to include the aural acquisition of the contents of any

wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See *Lee* v. *United States*, 47 S.Ct. 746, 274 U.S. 559 [71 L.Ed. 1202] (1927); *Corngold* v. *United States*, 367 F.2d [1] (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an 'interception.' (*United States* v. *Russo*, 250 F.Supp. 55 (E.D.Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. *The use of a 'pen register,' for example, would be permissible.* But see *United States* v. *Dote*, 371 F.2d 176 (7th 1966). *The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication.*" (Emphasis added). S. Rep. No. 1097, 90th Cong., 2d Sess. at 90 (1968), 1968 U.S. Code Cong. & Admin. News, p. 2178.

Various federal courts have adopted the position that a "pen register" device is not governed by Title III. *See United States* v. *Illinois Bell Telephone Co.*, No. 75-1909 (7th Cir., February 23, 1976), at 3; *United States* v. *Clegg*, 509 F.2d 605, 610 (5th Cir. 1975); *United States* v. *Falcone*, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States* v. *Finn*, 502 F.2d 938, 942 (7th Cir. 1974); *United States* v. *Brick*, 502 F.2d 219, 223 (8th Cir. 1974); *Korman* v. *United States*, 486 F.2d 926, 931 (7th Cir. 1973); *United States* v. *King*, 335 F. Supp. 523 (S.D.Cal. 1971), *aff'd in part*,

rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States* v. *Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971). Finally, Mr. Justice Powell reiterated this conclusion in his opinion (concurring in part and dissenting in part) joined by The Chief Justice and Mr. Justice Blackmun and Mr. Justice Rehnquist in *United States* v. *Giordano*, *supra*, 416 U.S. at 553-54.[*] This Court likewise holds that a "pen register" falls outside of Title III's definition of "interception".

Without disputing the nonappiicability of Title III, Telephone contends, however, that this Court's order authorizing the use of a "pen register" device "directs Telephone to furnish the FBI with the capaiblity to perform an *interception*" (Natoli Affidavit at 3), and that a court order directing an interception must comply with the strictures of Title III. (Natoli Affidavit at 3; Telephone Memorandum of Law at 7). Although the order employs the term "interception", it clearly does not direct that type of

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[*] In *United States* v. *Giordano*, *supra*, 416 U.S. 505, a Title III interception order was improperly obtained by an unauthorized official. The Supreme Court approved the suppression of all evidence resulting from the unlawful wiretap. Information revealed from the wiretap had formed the basis of probable cause upon which "pen registers" were subsequently authorized. The Court concluded that evidence resulting from the "pen registers" was tainted by its indirect connection with the unlawful wiretap, and was therefore inadmissible under a "fruit of the poisonous tree" rationale.

One court has observed that the substance of the minority opinion is not inconsistent with the majority holding. *See discussion* in text p. 7, *infra*.

interception contemplated by Title III. The order specifically permits only that interference, from the installation and operation of the device, necessary for the *limited* purpose of obtaining the telephone numbers of outgoing calls.

This Court adopts the jurisdictional basis for the issuance of a "pen register" that was enunciated by Mr. Justice Powell in the *Giordano* case. The minority opinion explained that

> "[b]ecause a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register." *United States* v. *Giordano*, *supra*, 416 U.S. at 554.

The minority noted further:

> "The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." *Id.* at n. 4.[5]

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[5] *Accord*, *United States* v. *Finn*, *supra*, 502 F.2d at 940; *United States* v. *Brick*, *supra*, 502 F.2d at 223-24. *But see United States* v. *Clegg*, *supra*, 509 F.2d at 610, holding that a "pen register" does not involve a "search" within the scope of the Fourth Amendment.

Telephone does not contest the existence of probable cause underlying the issuance of the court order. The "pen register" was ordered pursuant to affidavits concerning an on-going investigation of a criminal operation for which a wiretap order had been previously authorized under Title III. This investigation, then, concerns an offense deemed serious enough to justify a Title III interception. Refusal of Telephone to assist in furnishing technical assistance and facilities would frustrate the operation of the court order, properly granted upon a showing of probable cause.

On facts substantially similar to those in the instant case, the Seventh Circuit Court of Appeals cogently reconciled Mr. Justice Powell's minority opinion with that of the majority in the *Giordano* case.

> "There seems nothing essentially inconsistent with this order-application accommodation in the majority opinion which rejected the evidence obtained from the use of the pen register, not because of a lack of judicial authority to issue the form of order used, but the evidence was '. . . derived from . . . [an] invalid wire interception. . . .' 416 U.S. at 511 n. 2 and 533-34 n. 19. Apparently, Fed. R. Cr. P. 41, which deals with the traditional concept of search and seizure and which lodges jurisdiction and authority in the district courts to issue search warrants to search and seize 'tangible' objects was not thought by the Supreme Court to be a limitation upon the power of the district court to authorize, outside Title III, reasonable use of

investigative techniques rendered possible by modern technology as to 'nontangibles'. The commonsense approach used by the district court in issuing an order based on probable cause and following a procedure designed to comply with Fourth Amendment considerations in authorizing the use by the government of the pen register was a valid exercise of authority." *United States* v. *Illinois Bell Telephone Co., supra,* No. 75-1909, at 5.

Finding jurisdiction for issuance of the court order under this "commonsense approach," the Seventh Circuit likewise found "inherent authority" for the district court to direct Illinois Bell's compliance with and assistance in the installation of a "pen register" by federal law enforcement agents. The court concluded that

> "district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders. It seems more congruent with both reason and Congressional intent to have courts, rather than the telephone company, decide if a pen register should or should not be used. The authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former the latter would be worthless.
>
> "It is conceded that the district court had authority to enter an order authorizing government law enforcement agents to employ a pen register. Therefore, analogous authority for the proposition that the telephone company cannot frustrate the exercise of the district court's

order by refusing to make available its facilities and knowhow, is the All Writs Act. The All Writs Act, 28 U.S.C. § 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This statute allows a district court to defend a proper exercise of is [sic] jurisdiction, although it does not supply jurisdiction." *Id.* at 7-8.

This Court adopts the sound reasoning of the Seventh Circuit and holds that it possesses inherent jurisdiction to direct Telephone's compliance with the order. Furthermore, this Court finds jurisdiction for its directive under the All Writs Act. The mandate to Telephone is necessary to protect and effectuate the purpose of the concededly valid "pen register" order.

Accordingly, the application of Telephone to vacate or modify this Court's order authorizing the use of a "pen register" is in all respects denied.

So ordered.

Dated: New York, New York
April 2, 1976

CHARLES H. TENNEY
U.S.D.J.

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